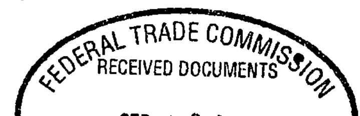
UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION




COMMISSIONERS: Deborah Platt Majoras, Chairman

| In the Matter of<br><br>RAMBUS INC.,<br><br>a corporation. | Docket No. 9302 |
|---|---|

# I. INTRODUCTION

Respondent Rambus Inc. ("Rambus") respectfully submits this motion to

reopen the record to admit evidence recently obtained by Rambus that substantially

[illegible]ines Complaint Counsel's proposed remedy and many of the proposed findings

*Id.* at 3. The Commission also cited to Complaint Counsel's argument that the materials

would "likely contradict evidence and positions taken in this matter. . ." *Id.*

These same concerns arise – and are greatly magnified – with respect to the evidence that is the subject of this motion to reopen. For example:

- the new evidence directly contradicts specific trial testimony solicited by

RDRAM technology. *See* Declaration of Steven M. Perry ("Perry Decl."), ¶2. In April 2005, after a lengthy delay caused by the defendants' unsuccessful efforts to move the venue of the action, the judge presiding over the San Francisco case ordered Micron and Hynix to produce to Rambus the documents they had already produced to the U.S.

III. **ARGUMENT**

**A. The Applicable Standard**

The Commission is authorized by 16 C.F.R. § 354(a) to reopen the record after oral argument where:

> "(1) the party offering the evidence has acted with due diligence; (2) the supplemental evidence is relevant, probative and non-cumulative; and (3) the supplemental evidence can be admitted without undue prejudice to the other party."

F.2d 357, 362-63 (D.C. Cir. 1977); *Brake Guard Products, Inc.*, 125 F.T.C. 138, 248 n.38 (1998).

### B. Rambus Has Been Diligent

As described above, Rambus did not receive the documents in question until mid-May of this year, when they were included in the production by Micron and Hynix of approximately one million pages of documents in the San Francisco litigation. Perry Decl., ¶ 4. Upon reviewing the documents, Rambus requested that the defendants agree to amend the Protective Order in the case to allow the parties to discuss the evidence with representatives of governmental agencies. *Id,* ¶¶ *5-7.* After each of the defendants refused, Rambus raised the issue with the Court, which recently ordered the parties to meet and confer further. *Id.* If this additional meet and confer process is

if RDRAM prices remained high, it would abandon its plans to adopt RDRAM throughout its product line, the DRAM manufacturers reached

agreements regarding the prices to be charged to Dell, in a successful effort to force Dell to drop RDRAM;

- By the spring and summer of 2001, when DRAM manufacturers had begun to offer DDR SDRAM devices in competition with RDRAM, the manufacturers agreed to fix DDR prices *below* market levels in the short

- Computer manufacturers such as Dell would have adopted the RDRAM

allegedly competitive nature of the DRAM market and other issues relevant to this appeal.

For the reasons set out below, this evidence is clearly relevant, probative and not cumulative.

**1. The Evidence Is Probative On Numerous Issues Raised By Complaint Counsel Below And Pursued By Them On Appeal**

**a. The Evidence Rebuts Complaint Counsel's Arguments that The DRAM Market Was Highly Competitive In The Relevant Time Period**

As part of its case-in-chief, Complaint Counsel contended that the DRAM market was highly competitive, and they proposed numerous findings in support of their position. These proposed findings include:

among DRAM suppliers").

In support of these and similar findings, Complaint Counsel relied primarily on testimony that they had solicited at trial from Micron and Hynix executives. *See*, *e.g.*, CCFF 100 (referring to DRAM manufacturers' desire to reduce costs and citing a former Hynix executive's testimony that "the competition is very severe"); CCFF 81 (referring to consolidation among DRAM manufacturers and relying solely on testimony by Micron's CEO that "it's been a very competitive business over time"); CCFF 1574

passed on to customers." Appeal Brief of Counsel Supporting The Complaint, filed April 16, 2004, p. 61. *See also id.*, pp. 2, 26, 28.

Complaint Counsel have not withdrawn the findings referenced above and have instead asked the Commission to adopt them on appeal. Given the number of their new findings at issue, given the fact that Complaint Counsel themselves solicited the

now-discredited testimony of Micron and Hynix executives as part of their case-in-chief, and given the fundamental importance of the underlying issue, Complaint Counsel simply cannot contend that the evidence proffered by Rambus is irrelevant. This direct evidence

findings – to the proposition that Rambus's RDRAM failed to win substantial market share because of technical issues or inherently high manufacturing or royalty costs. See CCFF ¶¶ 1800-1924.[2] Complaint Counsel apparently hope to have the Commission find [illegible]

its own merits, at which point Rambus launched an allegedly *anti*-competitive campaign [illegible]

### c. The Evidence Contradicts Complaint Counsel's Causation Theories.

The evidence at issue also contradicts Complaint Counsel's other theories of causation in this case. Complaint Counsel argue repeatedly that the DRAM market is competitive, in part because their case depends on theories about how optimal standards

**d. The Evidence Rebuts Complaint Counsel's Argument That The Proposed Remedy Is An Appropriate One**

Complaint Counsel have asked the Commission to enter an extraordinary and unprecedented remedy in this matter that would bar Rambus from seeking access to

the courts to enforce dozens of valid U.S. patents against admitted infringers, including Micron and Hynix (who between them control a substantial portion of the DRAM

[illegible]

[illegible] by Complaint Counsel is thus wholly unwarranted.

and from Rambus for many years and who, even today, are resisting its disclosure to the Commission and its staff.

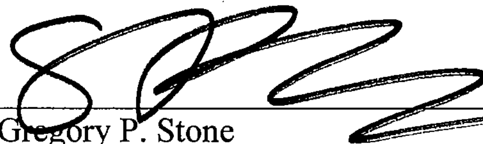
The Commission should not countenance such an abuse of its investigatory and adjudicatory functions. Any prejudice resulting to Complaint Counsel from the need to review this limited amount of evidence and (possibly) submit additional findings or argument is far outweighed by the Commission's responsibility to see that any findings or orders it makes are based on a complete record rather than on misleading testimony and erroneous statements in briefs and proposed findings.

CONCLUSION

For all of the foregoing reasons, the Commission should grant this motion and enter the order submitted herewith.

DATED: September 19, 2005

Respectfully submitted,



Gregory P. Stone
Steven M. Perry
Peter A. Detre
MUNGER, TOLLES & OLSON LLP
355 South Grand Avenue, 35th Floor
Los Angeles, California 90071-1560
(213) 683-9100

A. Douglas Melamed
WILMER CUTLER PICKERING
HALE AND DORR LLP
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000

Attorneys for Respondent Rambus Inc.

UNITED STATES OF AMERICA

COMMISSIONERS: Deborah Platt Majoras, Chairman
Thomas B. Leary
Pamela Jones Harbour
Jon Leibowitz

**BEFORE THE FEDERAL TRADE COMMISSION**

COMMISSIONERS: Deborah Platt Majoras, Chairman
Thomas B. Leary
Pamela Jones Harbour
Jon Leibowitz

| | |
|---|---|
| **In the Matter of**<br><br>**RAMBUS INC.,**<br><br>**a corporation.** | **Docket No. 9302** |

**CERTIFICATE OF SERVICE**